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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 228

GULF OIL CORPORATION,

Petitioner,

v.

EDWARD LIEBERMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 2, 1963 (R. 9a),* which denied petitioner's motion to dismiss an appeal filed by respondent herein from a judgment in the United States District Court for the Southern District of New York, rendered after a jury trial. Petitioner's application for a rehearing en banc by all the Judges of the Second Circuit was denied on April 29, 1963 (R. 13a).

* References are to pages of the printed record.

Question Presented

Was the Court of Appeals, on the facts of this particular case, required under Rule 73(a) of the Federal Rules of Civil Procedure to dismiss an appeal as untimely filed, where the District Court had granted an extension of time within the statutory period on the basis of excusable neglect?

Statute Involved

Rule 73(a) of the Federal Rules of Civil Procedure is the Rule involved. The Rule, so far as relevant, reads:

> "(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law. * * * except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: * * * granting or denying a motion under Rule 59 to alter or amend the judgment: * * *."

Statement of the Case

Respondent herein was plaintiff in a suit in the United States District Court for the Southern District of New

York, charging petitioner Gulf Oil Corporation with malicious prosecution. After a lengthy trial before Hon. Sidney Sugarman, U.S.D.J. and a jury, a verdict was rendered in favor of defendant Gulf (R. 2a). On December 19, 1962, an order and judgment on the jury's verdict was entered by the Clerk of the District Court, and a postcard notification was sent to the attorney for the plaintiff, the respondent herein (R. 2a).

Subsequently on December 28, 1962, respondent's attorney received another postcard from the Clerk of the District Court reading: "There was entered on the docket 12-26-62 an order and judgment amended" (Exhibit "2", R. 27a). (The word "amended" and the date were typewritten; the rest was a printed form). There was nothing on the card which was received within the ten-day applicable period, to indicate that the amendment was not under Rule 59(e), which would make the time to appeal therefrom thirty days from the entry of such amended judgment. On receipt of the postcard, Lieberman's attorney personally went to the clerk's office to learn in what respect it had been amended. He was unsuccessful because the order was not yet in the file (R. 23a). Due to the New Year's weekend, he could not get any information until Wednesday, January 2, 1963. He then learned on his telephone inquiry that the amendment was to eliminate from the original judgment the names of two co-defendants, William B. Edwards and John Leivia, who were in the original complaint, but not in the amended complaint on which the case was tried. The inclusion of names in a judgment of persons who were not parties to the litigation could be a matter of substance and not a mere clerical error; *e.g., Hardware Mutual Casualty Co. v. Schantz*, 186 F.(2) 968, 972 (7th Cir. 1951).

Thereupon, respondent Lieberman filed a notice of appeal from said amended judgment within thirty days, to wit, on January 25, 1963.

Subsequently on February 15, 1963, appellant Gulf served a notice of motion in the Court of Appeals to dismiss the appeal on the ground that the notice of appeal was not filed within thirty days from the original judgment. Then, on re-checking the clerk's file, respondent's attorney learned for the first time how the amendment came about; that is, it had been signed by the judge on the application of appellant Gulf, and that it was made under Rule 60(a), and not 59(e).

Thereupon on the same day, February 15th, the attorney applied by order to show cause to the trial judge who had signed the amended judgment for an extension of time on the basis of "excusable neglect", caused by the misleading notice from the clerk, to enable him to file a new notice of appeal from the original judgment. After oral argument, that motion was granted on February 18, 1963 and on the same day, within the extended time permitted by Rule 73(a), such notice of appeal was duly filed.

Appellant Gulf, having moved to dismiss the first notice of appeal as untimely, also moved to dismiss the second appeal on the ground that the trial judge had no authority to extend respondent's time. The Court of Appeals granted the motion to dismiss the first appeal, but denied the dismissal of the second. The unanimous opinion of the Court is reported at 315 F. 2d 403, and is printed in the Record herein, pages 1a-8a.

Argument

The sound reasoning supporting the decision of the Court of Appeals in the instant case is so well and com-

pletely set forth in its unanimous opinion as not to require additional, extended discussion in this memorandum. However, in answer to petitioner's specific points, particularly in its framing of the "question presented" (R. 2), it may be emphasized that the Court below did not put in issue the question of whether *Harris Trucklines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215, "*compels*" a Court of Appeals to affirm an extension of time to appeal granted by a district court, where there has not been the showing of excusable neglect required by Rule 73(a). This is a manufactured, straw issue.

Rather the issue is, as expressed in this memorandum (p. *ante*) "Was the Court of Appeals, on the facts of this particular case, required under Rule 73(a) of the Federal Rules of Civil Procedure to dismiss an appeal as untimely filed, where the District Court had granted an extension of time within the statutory period on the basis of excusable neglect?" The fact that the granting of an extension by the District Court must be based on "unique circumstances" is clear, for in upholding the discretion of the District Court in the case at bar, the Court of Appeals itself concluded that the unique circumstances present were even "a bit closer to the Rule than what *Harris* held to be close enough" (R. 84).

There is no real conflict between the Circuits on this issue as suggested by petitioner, and the cases cited in its "Reasons for Granting the Writ" do not support its contention. All are distinguishable on the facts. None have the unique circumstances present in *Harris*, or the case at bar.

Watson v. *Providence Washington Ins. Co.*, 291 F. 2d 736 (4th Cir., 1963), involved a case brought as an action at law. A notice of appeal was filed after the statutory

period. Appellant sought to justify his default on the ground that the action might have been brought in admiralty, where the notice would have been timely. No question of the propriety of an extension was involved.

Howard v. *Local 74, Wood, Wire and Metal Lathers International*, 208 F. 2d 1930 (7th Cir., 1953), was the case principally relied on in the Seventh Circuit's dismissal of the appeal in the *Harris* case (see 303 F. 2d 609, 611), which decision was reversed by this Court (371 U. S. 215). In *Howard* it was conceded that there was no misunderstanding about the notice of entry of judgment received by the attorneys for appellants. Therefore, the Court of Appeals rejected as specious the excuse that all of the numerous persons who might be termed plaintiffs in the class action had not been notified of the judgment. In addition, the Appellate Court found as a fact that the District Court had granted the extension "automatically", without considering whether there had actually been excusable neglect.

Knowles v. *U. S.*, 260 F. 2d 852 (5th Cir., 1958), is one of the cases specifically considered by this Court in its *Harris* decision. In that case, the notice of appeal was simply untimely filed, without any unique circumstances such as involved in either *Harris*, or the case at bar.

In *Edwards* v. *Doctor's Hospital*, 242 F. 2d 888 (2 Cir., 1957), the dismissal was based on the fact that final judgment was entered on March 26th, and the District Court's order, extending the time, was not made until May 31st, at least five days after the 60-day extended limit (242 F. 2d 888 at pp. 890-1). Again, there were no unique circumstances.

In *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 (2 Cir., 1960), the Court of Appeals simply held that the district

Judge was not "beyond the bounds of proper discretion" in denying an extension of time.

No one, and certainly not the Second Circuit Court, suggests that the limitation in Rule 73(a) has lost any of its vitality, or that the floodgates are now open to general exceptions. Any misunderstanding on that subject should be removed by *Wagner* v. *U. S.*, 316 F. 2d 871, decided by the same Court in April, 1963, subsequent to the case at bar. In *Wagner*, the Court said:

> "* * * as explained in our recent opinion in Lieberman *v.* Gulf Oil Corp., 315 F. 2d 403 (2 Cir. 1963), the purpose of the 1946 amendments of Rule 73(a) and 77(d) was to substitute for the open-ended possibilities suggested by that decision [Hill *v.* Hawes, 320 U. S. 520] *the strictly limited relief* now authorized by Rule 73(a)." (Emphasis added.)

That the decision now under consideration is in line with the spirit, as well as the precise language, of this Court in *Harris*, is evident from the opinion of the Court, by Mr. Justice Goldberg, in *Foman* v. *Davis*, 371 U. S. 178; decided in the same month as *Harris* (Dec., 1962), where the following was said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley *v.* Gibson, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1."

In the same vein, the Fifth Circuit in *Blanchard* v. *Commonwealth Oil Company*, 294 F. 2d 834 (1961) had earlier observed:

> "The Federal Rules are not intended to create procedural traps for the parties, forcing them to file premature appeals whenever some slight doubt arises as to the propriety of the court's way of entering judgment."

CONCLUSION

The petition should be denied.

Dated: New York, New York,
August 2, 1963

Respectfully submitted,

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